

South Carolina Law Review

Volume 2 | Issue 4

Article 7

Summer 6-1-1950

Editorial Section

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Recommended Citation

Editorial Section, 2 S.C.L.R. 399. (1950).

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**THE RESPONSIBILITIES OF OUR LAW SCHOOLS TO THE
PUBLIC AND THE PROFESSION***

It is a great day in the history of a state when it dedicates a new law school building. Such a dedication constitutes a reaffirmation of its belief in the indispensable place of law in our civilization. Civilizations have existed for centuries with but rudimentary science and the crudest of arts, but what civilization has ever survived without an adequate system of law? Especially important is the law in a civilization that prides itself on the high degree of individual liberty — intellectual, religious, political and economic — that has characterized ours from its earliest days. Among us the dedication of a law school is the clearest recognition that a state can give that it believes, first, that the law is the mainstay of individual liberty, and second, that the law must be systematically and scientifically taught by experienced and learned teachers, if the ideals of personal freedom which we have as a nation cherished over the centuries are to be preserved in an era of confused thinking and of violent action unparalleled in the world's history.

As we dedicate this splendid structure that the State of South Carolina has wisely devoted to the law and to its lawyers, present and prospective, I should like to pose two questions: What of legal education today? And what of the law today? Then to draw from the answers to these two questions certain conclusions as to the functions of a modern American law school.

The law school of today is the intellectual descendent of the law schools of yesterday. In 1779, with Valley Forge still a bitter memory, with the surrender of Cornwallis at Yorktown two years in the future, Thomas Jefferson, then Governor of Virginia, nevertheless thought that the establishment at the College of William and Mary of a professorship of law and police could no longer be postponed, and he accordingly persuaded his old friend and preceptor, Chancellor George Wythe, to accept the appointment. Patriot, signer of the Declaration of Independence, later a member of the Constitutional Convention, learned alike in the English law and in ancient and Elizabethan literature, and given to quoting them all in his opinions, George Wythe was a character of singular purity, simplicity and professional attainment. The acidulous John Randolph of Roanoke, never given to superfluous praise, characterized him as the incarnation of justice. American teachers of law may well be proud to trace their professional

*Delivered April 15, 1950 at the Dedication Ceremony of the new Law School Building.

lineage to him and they may well be a little envious of his students, among whom was numbered none other than John Marshall himself.

But despite Governor Jefferson's clear insight as to the desirability of teaching law as part of a broad program of higher education, the first American law school to achieve a degree of continuity was that founded in 1784 by Judge Tapping Reeve in the little town of Litchfield, Connecticut. It was attended by students from all over the country, including the great Calhoun of South Carolina. There the law was systematically taught through daily lectures with a thoroughgoing quiz every Saturday by Judge Reeve and his associates. Although the lecture system left much to be desired, the students of the school did acquire a much better training in the law as a system than was possible for a law clerk to obtain through the haphazard guidance of an ordinary practitioner. By 1833, however, advancing years, political quarrels and the advent of Mr. Justice Story at Harvard had combined to close the doors of the Litchfield Law School, but not until it had sent forth over a thousand graduates.

The name of Joseph Story will be found on any list of the ten greatest American judges. His service to legal education is no less important than his work as a justice of the Supreme Court of the United States and the many great legal works of which he was the author. His inaugural address as the Dane Professor of Law at Harvard in 1829 shows his magnificent concept of law as a subject of higher education. The spirit with which he approached the study and the teaching of the law is epitomized in his remarks to the students in his moot court:

Gentlemen, this is the High Court of Errors and Appeals from all other courts in the world. Tell me not of the last cited case having overruled any great principle — not at all. Give me the *principle*, even if you find it laid down in the Institutes of Hindu Law.

But even Story, great as he was, was unable to accomplish all that he had dreamed of in legal education. It remained for President Charles W. Eliot of Harvard, the great educational innovator of the nineteenth century, to make the seemingly rash experiment in 1870 of appointing to the deanship of the then moribund Harvard Law School Christopher Columbus Langdell, a legal recluse of the New York bar, who promptly introduced the methods of modern science into university legal education by setting his students to studying the reported cases rather than what some textwriter had to say about the cases. Langdell believed that the law was a science,

that the number of legal principles was relatively few and that these principles were to be derived by the law students themselves from the decisions of the courts rather than from secondary authority of the textwriters. He and his successors came to place the primary emphasis on the acquisition by their students of the art of legal reasoning from a study of the methods used by judges in the decision of actual cases. Legal knowledge was, of course, important, but it was deemed distinctly secondary to the art of legal reasoning. Langdell's methods were slow in winning acceptance even at Harvard, but over a half century they have prevailed throughout the country with results known to the entire educational world. With all of the shortcomings of our modern law schools—and they are many—everyone will admit that nowhere in our universities is better teaching being done than in our law schools, and any critique of the law schools of today must always be made in the light of that great accomplishment. Our law schools do teach young men to think.

What, then, are the shortcomings of our law schools, not of any one law school but of our law schools as a whole? First of all, we have neglected international law. I think it is safe to say that not one lawyer in five hundred, possibly not one lawyer in a thousand, has ever even had a course in international law, not to mention not being a master of the subject—and this at a time when international relations and foreign affairs are matters of supreme importance to the welfare of our country, yes, and to every one of us individually. And yet this was not always so, as you may see by looking at the opening chapters of Kent's *Commentaries* which with Blackstone's *Commentaries* constituted the basis of the legal education of our professional forebears. Indeed, as you will note from the same source, they were quite as familiar with the civil law that governs on the Continent of Europe and in all of South and Central America as they were with the common law. For decades after the American Revolution French and Dutch authorities on the civil law were familiarly quoted in the courts of all of our states, especially in commercial cases. Is it less important today that we be familiar with the institutes of the nations to the south of us and on the Continent of Europe than it was 175 years ago when our commerce and intercourse with them were relatively slight? Even less excusable is our neglect of public law generally in favor of private law. Most law schools give only attenuated courses in constitutional law; municipal corporations is a neglected topic; and taxation was quite untaught until the Sixteenth Amendment inevitably made it a "bread and butter course", because taxes became a major problem in every private

transaction. The interrelationship between the study of law and of government which was proclaimed in Chancellor Wythe's professorship of Law and Police at William and Mary and which characterized the teaching of Chancellor Kent at Columbia, of Justice Wilson at Pennsylvania, of Judge Story at Harvard and of Judge Cooley at Michigan, to number only a few of the highest stars in the galaxy of great teachers of public law, has been lost to sight in the law schools, and the teaching of public law has passed by default, in the main, to the political scientists, as if it were really possible to teach public law without private law on the one side and government on the other. We have truncated the course in criminal law and criminal procedure — where criminal procedure is taught at all — to an abbreviated first-year course, as if all of our civil rights did not depend in the ultimate analysis on the enforcement of the criminal law. This we have let go on at a time when the Director of the Federal Bureau of Investigation tells us that organized crime is more rampant than it was after World War I and in the prohibition era and when the American Municipal Association, an organization of municipal officials throughout the country, has petitioned Congress to investigate the taking over of local government by organized gangsters and when Congress has appropriated a large sum of money to make such an investigation.

Again, in our preoccupation with the topics of private substantive law that serve our commercial civilization we have neglected almost entirely the field of judicial procedure and the administration of justice in our courts, notwithstanding the fact that an impartial nationwide survey reveals our startling deficiencies in the selection of both judges and jurors, in our methods, or rather our lack of methods, of judicial administration and in our procedure and trial practice, not to mention what goes on in many states in our local criminal and traffic courts, with politically appointed police judges in the cities and fee-collecting justices of the peace in the rural areas. Even in the study of private law we have emphasized judicial decisions at the expense of statutes, which really are much more troublesome to handle, and of the administrative regulations and rulings which, like them or not, constitute the outstanding legal development of the twentieth century. We still persist in teaching even private law as a set of technical rules, quite apart from their economic, political and social background with which there must be sooner or later a reconciliation. We teach our law, moreover, not as a system as they did in the early American law schools, and as Blackstone and Kent present it, but as a series of unintegrated courses, forgetting the wis-

dom of Maitland's comment that the law is a seamless garment. Even in the subjects that we do teach, how often do we teach the casebook through?

And finally, in spite of our preoccupation on the *What* and the *Why* of the law, must we not begin to teach our students the *How* of it all? Too long have we failed to see what is going on in our medical, engineering and business schools in teaching both science and practice. Too long have we let the splendid teaching of the art of legal reasoning cover our obvious deficiencies. True, we are not altogether to blame, for we will teach whatever the Supreme Court through the bar examiners tells us we must to prepare our students for the bar examinations. But have we not owed an obligation to our students and to the bar and to society in general to have suggested long since to the powers that be that the scope of the bar examinations should be enlarged to meet the realities of the twentieth century? There is no novelty in what I have been saying about our law schools. Others have said as much and more on many occasions. In fact, I said much more than I have here at the annual convention of the Association of American Law Schools and I said it more vehemently and my remarks were received with much applause—but nothing or very little happens. Perhaps the study of the law schools now being made by the Survey of the Legal Profession may pry us off dead center.

So much for legal education today. Where do we find ourselves in the law? What of the lawyer of today? Where Coke and Bacon had to deal with 5,000 printed decisions, and Mansfield and Hardwicke, Kent and Story, with 10,000, we have to cope with 2,000,000. The statutes for the last year that I calculated them ran over 46,000 pages. There is no one who can even hazard a guess at the bulk of our administrative regulations and rulings, for most of them are not even printed. With the aid of the digests we can and do find our way around among the decisions, but when it comes to statutes it is next to impossible to learn how a given problem is being handled in all of the 48 states; we simply do not have the necessary mechanical apparatus. We do not even have available a digest of all of the decisions interpreting all of the clauses and phrases of our various state constitutions. Our written law is a labyrinth and a nightmare, and yet who can gainsay the fact that it is constantly growing in importance? Think, too, of the bulky ordinance books of the many municipalities that you and I are supposed to know something about but of which we are quite oblivious as we drive our automobiles through town after town trusting to St. Ives to save us from the violation

of local laws quite unknown to us. All of this law is at least published in some form or other. But what would you do if a client came to you with this simple proposition? He wants to start a business in every state of the Union that depends upon the statutes and the administrative rulings and regulations in a certain field in each state. He desires you to assemble all of the applicable law for him. Of course, you could give him the statute law of your own state. For the statutes of the other states you would probably feel that it would be risky to do otherwise than enlist the aid of some lawyer in each jurisdiction. As to the administrative regulations and rulings in your own state, assuming that they have not been published as generally they are not, you would doubtless wish to consult some expert at the State Capitol, if after due inquiry you can locate one. Similarly in each state you would have to consult not any mere member of the bar but an expert if you can find one. You will discover that you will have quite a time locating your expert in each jurisdiction. Thus it would take at least 96 lawyers to give you the law in the United States on some one simple business proposition. Judged by any such simple problem, can we with fairness claim that our law in the middle of the twentieth century is civilized, when we, trained members of the bar that we are, cannot ascertain it for ourselves? But these problems are primarily mechanical; industry would cure them.

Our difficulties are more fundamental. Is it not made obvious to us every day, as we pick up our newspaper, that we are living in a world in which the predominant characteristic is politics, power politics, and that whether we turn south, east, or west its mood is revolutionary? Revolutionary periods are not unknown in the history of the common law. More than once the common law has encountered opposition, internal and external, and from each of such encounters it has emerged from the fray stronger than ever. There are two phases, however, of present-day problems that may well give us pause. First, although the law is ever changing, controlling new economic, political and social conditions, or being moulded by them, the pace of social change — we may well call it the velocity of social change — is today quite without precedent, as is the consequent strain on the law itself. The second significant fact is that in contradistinction to other revolutionary periods in the history of the common law the state of dissatisfaction on the one hand or of fear on the other is now virtually world-wide. The revolutionary period of the Stuarts, culminating in the Glorious Revolution of 1688, which meant much for English and American liberty, was essentially a local phenomenon,

unaccompanied by similar movements elsewhere. The American Revolution of 1776 had resulted by 1783 in the independence of thirteen remote colonies before the French Revolution of 1789 broke upon a startled world. In contrast we have been witnessing simultaneously the dismemberment of the British and Dutch empires in Asia, civil war in China, Russian aggrandizement in Eastern Europe, attempts at reconstruction in Western Europe, religious war in Palestine, successive revolutions in South America, and in this country, in the face of unparalleled industrial activity for several years, an overwhelming amount of social unrest and fear.

As we reflect on this discouraging world scene, we will do well to recall that freedom, as we Americans have known it, has existed for less than two hundred years out of the five thousand years of recorded history and in but a relatively small part of the inhabited globe. What we have mistakenly fancied to be our birthright without obligation on our part is plainly not the universal way of life. Indeed, there are millions of human beings the world over, some from choice but many more from fate, who doubt, however desirable our way of living may seem, that it can be the normal lot of mankind. Nor are the doubters all in foreign lands. We have had our princes of privilege in the camps of both capital and labor; we have also had, to be uncomfortably specific, our Huey Longs and our large city bosses, our Earl Browders and our fellow travelers. Whatever others may believe, we, who owe allegiance to the law, realize that without the law we could not have liberty as we have known it and that without our concept of liberty we could not have the law as we know it. We know, too, that earlier crises for our law and liberty have been met and mastered more than once by the leaders of our profession. Professionally and historically, then, we have a special responsibility in the present-day situation. Obviously, we must, first of all, in lawyer-like fashion face the facts as to the actual operation of our system of law today in the light of both national and world conditions. Then, if defects appear as the result of our taking inventory, we must study how the great judges, lawyers, and teachers of earlier times went about the work of safeguarding their law and liberty by improving the administration of justice. In this way we in our day and in our own way may best hope to preserve our system of law and liberty, which every right-thinking American treasures as one of his most precious possessions.

The fundamental problem that confronts us is age-old. It arises from the seeming inability of mankind to govern itself. The desired goal has long been known to every student of the law, of history,

and of politics. I have never seen it better phrased than it was by Heraclitus of Ephesus twenty-five hundred years ago: "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license". We Americans thought we had gone far toward solving the problem, but today we find ourselves confronted with it in as aggravated a form as has ever perplexed mankind, with dangers both internal and external.

In these days of complicated international relations, with a fading hope for One World and a growing fear of Two Worlds, is not a deep understanding of public law and government more important for lawyers than ever before in the history of mankind? Should the profession or the public generally be willing to leave these matters either to the political scientists or to public officeholders? It will not do to say that we can always find a few lawyers who know the answers. The very suggestion points to the greatest default of the legal profession today—a lack of a sense of individual responsibility on the part of every member of the bar for his position as a leader of public opinion in his own community, be it a hamlet or city, county or state, the nation or the world. It was personal influence of this sort that built up the respect for law—"a government of laws and not of men," if you please—that marked the golden age of the American bar following the American Revolution. Just as great a responsibility, it is clear, rests on the individual members of the bar today. No other group in society is, or at least should be, so well equipped to lead or so responsible for leadership. It is a responsibility shared by lawyers in all democracies, as a great English legal scholar, Sir Maurice Sheldon Amos, so clearly pointed out to his fellow countrymen six years before World War II:

What we think, and write, and teach about the law is a matter of practical importance, for the conceptions which gain ascendancy in the community as to the significance and the mission of the law mould and inspire the actions of the legislator and the judges. Upon the legal profession in each country there devolves then a responsibility, the due sense of which has for some long time past been in abeyance, the responsibility for thinking and advising the nation as a profession. This responsibility lies less immediately upon the Courts, since they must "go with the main body, not with the advance guard"; but it lies upon all those who have a less immediate responsibility for the preservation of the specious appearance of immutability, to con the chart, to determine at frequent intervals our latitude and longitude, and to

lay the course for the next port. We want far more information, more statistics; for lawyers, like doctors, know too little of the subsequent fate of the lives and concerns in which for a moment they have intervened . . . in default of which there is some ground for the fear that a justly impatient community will one day send us all about our business.

No class in our society has been more generous with its time and the use of its capacity for leadership in social enterprises than the lawyers. They are always to be found in key positions on the boards of colleges and hospitals and in the forefront of community drives. But too many of the ablest of them have shrunk from public office-holding, from party leadership, and from posts of influence in the formation of public opinion and even from active participation in the affairs of the organized bar. The reasons are known to all. First of all, successful lawyers are very busy men; like all professional men they render personal service and much of their work cannot be delegated. Time is a most important element in their lives. Even more controlling, the lawyer is subject to the same pressures to escape his duties as a citizen as are all other men. His family is likely to oppose his getting in what is often called a "dirty game". They forget that it is only through politics that a democratic, representative government can be run, and that it is the acts of the men who run our government more than any others that determine whether we shall have peace or war, prosperity or depression. The stakes are high enough, it would seem, to merit anyone's attention. Fortunately for our country, family and social aversion to participation in public affairs disappears in the face of war. Then everybody renders yeoman service. Even though in each war the military have started by claiming that lawyers were worth "a dime a dozen", it is significant that the value of their services was soon recognized whenever the capacity for independent thinking was a requisite. But why must patriotism always be thought of solely as a wartime virtue? Is a war any less a war for being a cold war?

In earlier crises the common law has been saved by the genius of a few men. It was Lord Coke, advocating in the House of Commons the principles he had championed on the bench before he was summarily dismissed as Chief Justice of England by James I for refusing to submit to his command not to proceed with the hearing of the case involving the King's prerogative—it was Lord Coke and a few other Parliamentary leaders who saved the common law from the reception of the Roman Law with its absolutistic ideas and who

preserved the individual civil rights of English subjects and hence of American citizens. The triumph of the Parliamentary forces was due to his moral courage as much as to his vast knowledge of the law and the justice of his cause. In admiration of his public service we can well afford to forget some of his personal meanness. Can there be any doubt that the example set by him and his Parliamentary associates was a source of great inspiration to the revolutionary patriots of America a century later? These constitutional gains of Englishmen were crowned in the Glorious Revolution of 1688 by the Bill of Rights and the Act of Settlement, which marked, among other things, the achievement for the first time of the independence of the judiciary.

In the period of the American Revolution, the French Revolution and the English Industrial Revolution, a revolutionary era which our age resembles more than any other except that ours is far greater in intensity, the common law again was saved by the genius of a few men — Mansfield on the King's Bench, Hardwicke and Eldon in Chancery, Burke in the House of Commons, and Blackstone in his studywriting the *Commentaries*, and in this country Marshall, Kent, and Story. They were the leaders in adapting the law to the needs of an entirely new age.

Today we are confronted in forty-eight different states and in the Federal government with a crisis in the law greater than either of those I have described. No longer do a few men have the authority even had they the knowledge and wisdom on which to act. Clearly our efforts must be cooperative and they must be nationwide in scope with every state doing its part. We have had beginnings that point the way in the uniform statutes drafted by the National Conference of Commissioners on Uniform State Laws, in the Restatements of the American Law Institute, in the Rules of Civil and Criminal Procedure promulgated in the Federal courts, in the Judicial Councils and in the Judicial Conferences which have been organized here and there throughout the country and in the activities of our many bar associations. Here we are confronted with tasks that preclude the judges, many of whom are carrying staggering loads, from repeating the work of their great predecessors of a century and a half and three centuries ago. Nor has the average practicing lawyer any more leisure than the judges, if he is worth his salt. Obviously the leadership in the great task of adapting the law to the needs of the latter half of the twentieth century and of simplifying it in the process must center in our law schools. I am not suggesting that all of the work can or should be done by the law school faculties alone. They

will have to call to their aid the wisest of our judges, the ablest of our lawyers, the outstanding administrators, businessmen and labor leaders. And every law school must be able to count on the cooperation of every other school. I see no other available or potential agencies to do the work that must be done if law and liberty are to be preserved. Fortunately, some of our law schools are trying to recognize their great responsibility and opportunity. The function of the law schools of the second half of the twentieth century, as I envision it, will be twofold. First, it will be responsible for training the lawyers in the future with the enlarged and the enriched curriculum of which I have spoken. Second, and equally important, they will also have the primary duty of leadership in the restatement and simplification of the entire body of the law and in so doing they will be giving their teaching a realism and a vitality that it could in no other way acquire. The task is a tremendous one. It is one that is crying to be done, if our civilization is to be maintained in the form and mould that every clear thinking lawyer would have it. Give our law schools the men and the material, as you are doing here. Give them the encouragement and the cooperation to which they are entitled from the bench, the bar, the government, industry and labor, and I have no doubt that they will respond effectively and enthusiastically to the greatest challenge that has ever come to American law or American lawyers.

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